State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

June 3, 2013
OM 13-14

Mr. Kenneth J. Block

RE: Block v. Rhode Island Board of Elections

Dear Mr. Block:

The investigation into your Open Meetings Act ("OMA") complaint filed against the Rhode Island Board of Elections ("Board") is complete. By correspondence dated March 4, 2013, you allege the Board violated the OMA when its February 27, 2013 meeting agenda did not adequately inform the public of the nature of the business to be discussed. More specifically, you allege that ten (10) legislative bills were discussed under the agenda item "[d]iscussion and possible vote in regards to election legislation in the R.I. General Assembly," but that the agenda did not identify the number or nature of legislation to be discussed.

In response to your complaint, we received a substantive response from the Board's legal counsel, Raymond A. Marcaccio, Esquire, who also provided an affidavit from the Board's Executive Director, Robert Kando, Esquire. Attorney Marcaccio states, in pertinent part:

> "The complaint challenges the adequacy of the agenda notice published for the Board's February 27, 2013 open meeting. In relevant part, the notice states: 'Discussion and possible vote in regards to election legislation in the R.I. General Assembly.' * * * Mr. Block contends that in order to satisfy the notice requirements of the OMA, the agenda needed to include a reference to each bill that the Board intended to discuss and potentially vote upon. Since there were ten bills discussed at the meeting, Mr. Block argues that the notice was legally required to identify each bill separately. * * * [N]either the OMA, nor the judicial and agency interpretation of the OMA, requires such detailed specificity.

The OMA requires that * * * supplemental notice be given at least forty-eight hours before the meeting and that this supplemental notice 'shall include the date the notice was posted, the date, time and place of the meeting, *and a statement specifying the nature of the business to be discussed.*' * * * The Rhode Island Supreme Court has explained that this statutory language 'obligates [a] public body to provide *fair* notice to the public under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon.' *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 797 (R.I. 2005) * * * The public notice at issue in *Tanner* merely indicated that 'interviews' for potential board and commission appointments would take place during the upcoming public meeting. * * * In reality, the town council voted and appointed individuals to various positions. [ ] Because the notice did not fairly inform the public of what would take place at the public meeting, the Court concluded that the OMA was violated.

* * *

The Board's notice meets the OMA requirements. The agenda contents describe the nature of the business to be discussed, *i.e.* the elections-related legislation pending before the Rhode Island General Assembly. Further, the agenda sets forth the action to be taken: a discussion and possible vote on the proposed legislation. Unlike *Tanner*, where the public body misled the public by not indicating that it may vote upon the appointment of persons being interviewed, the Board gave fair and reasonable notice that it may vote upon legislation introduced in the General Assembly.

* * *

This case does not present a situation where the public body attempted to mislead the public. To the contrary, the public reasonably and fairly was put on notice of the nature of the Board's intended actions. With respect to the complainant, the email communications between Mr. Block and the Board staff establish that the Board made additional efforts to make sure that Mr. Block was aware of the nature of the business to be conducted at the February 27, 2013 meeting. Immediately after Board employee [Mr.] Gregory McBurney sent the notice and agenda to Mr. Block, he received a reply inquiry from Mr. Block, asking for details on the legislation that would be discussed. * * * In response, Mr. McBurney provided the complainant with a complete list of the bills that the Board would be

> discussing at its meeting. * * * Mr. McBurney even attached each of the draft bills to the email."[1]

Mr. Kando states, in pertinent part:

> "The Board of Elections posted its meeting notice and agenda for its February 27, 2013 meeting with the Office of the Secretary of State (SOS) on February 25, 2013 at 2:47 p.m. * * *
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> At 2:59 p.m., on February 25, 2013, Board staff member [Mr.] Gregory McBurney sent a copy of said notice and agenda to various media entities and to the recognized political parties, including the Moderate Party of Rhode Island. Said notice was provided by email.
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> At 3:04 p.m., on February 25, 2013, Mr. Block responded to the Board's email, inquiring as to the specific legislation that would be discussed and possibly voted upon. Further email communications were exchanged between Board staff and Mr. Block over the course of the next 24 hours. * * *
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> In response to his inquiry, the Board staff provided Mr. Block with a pdf copy of each bill that was intended to be discussed at the February 27, 2013 meeting. Said copies were emailed to Mr. Block at 8:22 a.m. on February 26, 2013. While the Commissioners discussed the aforementioned legislation, no draft bill was voted upon at said meeting."[2]

You filed a reply dated April 8, 2013. You state, in pertinent part:

> "In its most recent statement on the boundaries of the Open Meetings Act (OMA), the Rhode Island Supreme Court found an agenda item remarkably similar to the one at issue here deficient and negated the underlying action of a local zoning board. In *Anolik v. Zoning Board of*

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[1] The fact that you had actual notice of the bills to be discussed raises the issue of whether you are "aggrieved," pursuant to R.I. Gen. Laws § 42-46-8. You contend that you are aggrieved because even though you had actual notice, you had less than forty-eight (48) hours notice and this hindered your efforts to fully review the bills to be discussed and contact others. Although you offer no support for these arguments, we are inclined to reach the merits of your complaint. See R.I. Gen. Laws § 42-46-8(e).

[2] Copies of the legislation to be discussed were also sent to other email addresses and while we are not provided information concerning the recipients it is noteworthy that the email addresses that received copies of the legislation to be discussed were the same email addresses that received the original public notice referenced by Mr. Kando.

> *Review of the City of Newport*, No. 2012-76-Appeal (April 2, 2013), the Court considered an agenda item that referenced correspondence from a lawyer seeking to extend the effective date of a prior successful zoning application. But, the agenda item in question referred to the subject property in no more than generic terms. In the words of the Court, it 'was completely silent as to which specific property was at issue.' * * * It provided none of the specific identifying information, such as a street address or a lot number, that a member of the public or an effected neighbor would need to understand the nature of the pending business before that public body. * * * Accordingly, the Court concluded * * * that the challenged agenda item did 'not reasonably describe the purpose of the meeting or action proposed to be taken.' * * *
>
> Like the agenda item just struck down by our Supreme Court in *Anolik*, the one at issue here from the BoE was also defectively generic in its scope and did 'not reasonably describe the purpose of the meeting or action proposed to be taken.' [ ]. It referred only in general terms to a discussion of pending election legislation, but without giving the public any fair notice of the specific bills or proposed laws to be discussed. This is just like the absence of a street address or a lot number in *Anolik*. That absence of detail, and that reliance on broad but uninformative generalities, is exactly what the Court found ultimately fatal in the zoning agenda at issue in *Anolik*."

You also acknowledge that on March 11, 2013, the Board convened another meeting wherein it discussed the ten (10) election related bills and that this public notice contained a statement indicating the nature of each of the ten (10) bills, but did not contain the bill numbers. Accordingly, you request that this Department also opine on whether the lack of bill numbers on the March 11, 2013 agenda violated the OMA.[3]

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and

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[3] We decline to reach this issue. First, unlike the issue of the February 27, 2013 agenda where you received notice of the nature of the bills to be discussed less than forty-eight (48) hours prior to the meeting and claim you were aggrieved, you make no similar argument with respect to the March 11, 2013 agenda. Second, you raise this issue for the first time in your April 8, 2013 reply, and therefore, the Board has never had the opportunity to address this issue. We realize that the Board's March 11, 2013 agenda post-dates your March 4, 2013 complaint, and therefore could not have been presented at that time, but we nonetheless respectfully conclude that this issue could have been raised in some manner prior to the Board's March 27, 2013 response so as to enable the Board an opportunity to respond. In any event, as noted, there is no evidence you were "aggrieved" by this issue.

enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Board violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The issue for this Department to decide is whether the agenda item for the February 27, 2013 meeting was sufficient to inform the public of the nature of the business to be discussed. The agenda item at issue for the February 27, 2013 meeting stated, in pertinent part:

> "Discussion and possible vote in regards to election legislation in the R.I. General Assembly."

In Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), the Rhode Island Supreme Court examined the OMA's requirement that a public notice contain "a statement specifying the nature of the business to be discussed." The Court concluded that although the standard is "somewhat flexible," the contents of the notice "reasonably must describe the purpose of the meeting or the action proposed to be taken." Id. at 797-98. The Court added that a flexible "approach accounts for the range and assortment of meetings, votes, and actions covered under the OMA, and the realities of local government, while also safeguarding the public's interest in knowing and observing the workings of its governmental bodies." Id. at 797. Although the Court provided no bright line rule regarding the level of specificity of a posted notice, the Court determined the appropriate inquiry is "whether the [public] notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted." Id.

As stated in your reply, the Rhode Island Supreme Court, on April 2, 2013 re-examined the Tanner standard in Anolik v. Zoning Board of Review of the City of Newport, 2012-76-APPEAL, 2013 WL 1314947 (R.I., Apr. 2, 2013). The relevant facts of that case are as follows. In November of 2008, defendants received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to Congregation Jeshuat Israel's property that had been approved by a previous zoning board decision. Id. at 2. That previous decision expressly contained a condition to the effect that there be substantial completion of the improvements within two years. Id. The agenda item for the February 23, 2009 meeting stated:

> "IV. Communications:
> Request for Extension from Turner Scott received 11/30/08 Re: Petition of Congregation Jeshuat Israel"

At the meeting, the board voted unanimously to approve the request for an extension of time which required that the "improvements must be started and [be] substantially complete [by] February 23, 2011." Id. On August 21, 2009, the plaintiffs filed a

complaint in Superior Court alleging that the agenda item violated the OMA because it was "a 'vague and indefinite' notice to the public and one lacking in specificity." Id. The Superior Court granted defendants' motion for summary judgment. Id. at 4. On appeal, the Supreme Court looked to Tanner and noted that R.I. Gen. Laws § 42-46-6(b) requires the "public body to provide fair notice to the public under the circumstance, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon." Id. at 6-7 *quoting* Tanner, 880 A.2d at 797. The Court held that the agenda item was "completely silent as to which specific property was at issue; the agenda item provided no information as to a street address, a parcel or lot numbers, or even an identifying petition or case number." Id. at 7. (Emphasis in original). The agenda item "fails to provide any information as to exactly what was the reason for the requested extension or what would be its duration." Id. at 8.

Similarly, in the instant case, the agenda item for the Board's February 27, 2013 meeting was "completely silent" as to what election legislation was to be discussed and possibly voted upon. The agenda item lacked any identifying information concerning the election legislation other than it involved legislation pending in the Rhode Island General Assembly. Indeed, the Board failed to disclose not only the nature of the legislation to be discussed, but the number of legislative bills that would be discussed. Similar to the agenda item in Anolik, the Board's February 27, 2012 meeting agenda contained "vague and indefinite notice to the public" and "one lacking in specificity." It provided the barest of information. Accordingly, the Board violated the OMA by failing to provide on its agenda a statement specifying the nature of the business to be discussed. See R.I. Gen. Laws § 42-46-6(b).[4]

Upon a finding of an OMA violation, the Attorney General "may file a complaint on behalf of the complainant in the superior court against the public body." R.I. Gen. Laws § 42-46-8(a). "The court may issue injunctive relief" and/or "may impose a civil fine not exceeding five thousand dollars ($5,000) against a public body or any of its members" for a willful or knowing violation. R.I. Gen. Laws § 42-46-8(d). In this instance, we find no evidence that the Board knowingly or willfully violated the OMA. We are aware that the Anolik opinion was issued subsequent to the filing of the Board's response to your complaint and thus the Board did not have the benefit of its guidance. Additionally, the Board emailed the notice, albeit insufficient, on February 25, 2013, and sent copies of the

[4] We would be remiss if we did not address a point in the Board's response. Legal counsel for the Board indicated that "additional efforts" were made to make you were aware of the nature of the business to be conducted at the February 27, 2013 meeting. More specifically, you emailed the Board asking for details on the legislation and the Board emailed you (and others) a list of the bills to be discussed and attached a copy of the draft bills. Respectfully, these additional efforts are of no moment to our OMA analysis concerning whether a violation occurred, although as discussed above, do weigh against a willful or knowing violation. A public body's notice must be sufficient so as to "fairly inform the public of the nature of the business to be discussed or acted upon." Tanner, 880 A.2d at 797. (Emphasis added).

bills on the morning of February 26, 2013. It is hard to reach a finding of willful or knowing when the Board provided actual copies of the bills prior to the February 27, 2013 meeting. We also conclude that under the facts of this case injunctive relief is not appropriate since it appears no vote was taken at the February 27, 2013 meeting and the agenda item was re-discussed at the March 11, 2013 meeting. See Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 802 (R.I. 2005) ("By scheduling, re-noticing, and re-voting on the challenged appointment, the town council, albeit belatedly, was acting in conformity with both the letter and spirit of the avowed purpose of the OMA – to ensure that 'public business be performed in an open and public manner.'"). This finding serves as notice to the Board that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so within "ninety (90) days of the attorney general's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later." R.I. Gen Laws § 42-46-8. Please be advised that we are closing our file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Lisa Pinsonneault

Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Raymond A. Marcaccio, Esquire